

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF: LARRY SELLNER Delaware County, Iowa	ADMINISTRATIVE CONSENT ORDER NO. 2007-AFO- 32
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TO: Larry Sellner
2763 197th Street
Earlville, Iowa 52041

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Larry Sellner for the purpose of resolving the issues surrounding a manure discharge at Mr. Sellner's facility and the resulting fish kill in Plum Creek. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

Sue Miller, Field Office #1
Iowa Department of Natural Resources
909 West Main Suite 4
Manchester, Iowa 52057
Phone: (562) 927-2640

Relating to legal requirements:

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Urbandale, Iowa 50322
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459A and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

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III. STATEMENT OF FACTS

1. Larry Sellner owns and operates an open lot animal feeding operation located at 2763 197th Street in Earlville, Iowa. Mr. Sellner had approximately 50 milking cows, with approximately 100 head total.

2. On July 18, 2007, DNR Field Office 1 was contacted by DNR Fisheries. An anonymous person had contacted DNR Fisheries to report dead fish in Plum Creek at Plum Creek County Park. On that same day, Mike Wade, DNR Field Office 1, met with DNR Fisheries personnel at the bridge crossing Plum Creek on 218th Street (See Site B on Attachment A). Dead fish were observed at this location. Mr. Wade and the DNR Fisheries personnel checked bridge sites at locations A-H on Attachment A. Dead fish were observed at sites A-E. Dead fish were not observed at sites F-H.

3. After identifying the upper most side where dead fish were observed, Mr. Wade visited Mr. Sellner's feedlot. Mr. Wade explained to Mr. Sellner the situation and asked to inspect the portion of Plum Creek on Mr. Sellner's property. Mr. Sellner told Mr. Wade the number of cattle at his facility and stated that he stacks manure in the corner of the small open lot. At this point, Sue Miller, DNR Field Office 1, joined Mr. Wade. Mr. Wade and Ms. Miller inspected the open dairy lot located on the southeast side of Mr. Sellner's property. There was a free stall barn and an open concrete lot; the cattle in the buildings were free to go outside. There was some manure on the concrete open lot floor and manure solids were observed coming out of the drainage holes in the concrete walls. Water mixed with manure and milky waste from the milk parlor was also observed running through the drainage system at the farm. Manure from the lots was washed off and flowed into a ditch and through a culvert where it eventually flowed in Plum Creek. Mr. Wade and Ms. Miller observed dissolved manure entering Plum Creek. Mr. Wade and Ms. Miller observed a reddish-orange plume in Plum Creek. Water samples were collected at sites B, C, D, and E on Attachment A. The laboratory results of the samples are as follows:

Site Location	Ammonia (MG/L)
Site B – Downstream feedlot culvert	27
Site C – Discharge to stream	9.4
Site D – Downstream of the facility	0.71
Site E – Upstream of the facility	0.60

4. The fish kill evaluation by the DNR Fisheries personnel concluded that 15,235 fish valued at \$3,381.72 were killed. The cost of performing this evaluation was \$613.98. The total fish kill assessment totals \$3,995.70.

5. On July 26, 2007, a Notice of Violation letter was issued to Mr. Sellner for the water quality violations caused by the manure discharge from his facility. A follow up letter was sent to Mr. Sellner on August 9, 2007 clarifying some of the items in the July 26, 2007 letter.

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6. Mr. Sellner has contacted the NRCS office in Delaware County for assistance. He is taking steps to prevent manure runoff from his facility in the future. On August 21, 2007, Mr. Sellner submitted a written plan of how manure runoff would be controlled at his facility. The plan stated the following actions: 1) scrape lots daily, 2) installation of metal plate over the cattle yard cement wall, 3) construction of a settling basin, 4) fence off waterway, and 5) seed waterway. Mr. Sellner is in the process of selling his cows and is planning on discontinuing his animal feeding operation.

IV. CONCLUSIONS OF LAW

1. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. The discharge of manure from Mr. Sellner's facility to Plum Creek is a violation of this provision in that it was acutely toxic to fish and it created objectionable colors.

2. Iowa Code section 455B.186 prohibits the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. A permit has not been issued for this facility and DNR Field Office 1 found evidence of the discharge of untreated pollutants into waters of the state. The above-facts indicate a violation of this provision.

3. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC chapter 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge at Mr. Sellner's facility.

V. ORDER

THEREFORE, it is hereby ordered and Mr. Sellner agrees to do the following:

1. Mr. Sellner shall comply with the Plan of Action submitted to DNR Field Office 5 on August 21, 2007 and referred to in Section III, Paragraph 6 above;
2. Mr. Sellner shall pay restitution in the amount of \$3,995.70 within 30 days of the date the Director signs this administrative consent order; and

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3. Mr. Sellner shall pay a penalty of \$2,000.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. Iowa Code sections 459.603 and 455B.191, and Iowa Code section 459A.502, authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty. The administrative penalty assessed by this administrative consent order is \$2,000.00. The administrative penalty is determined in accordance with the following:

Economic Benefit – Failure to properly contain all manure has allowed Mr. Sellner to save time and money. By failing to properly contain the manure and failing to timely apply the manure, Mr. Sellner has gained an economic benefit. Therefore, \$250.00 is assessed for this factor

Gravity of the Violation – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Actual harm to the environment was documented by visual and olfactory observation of impact to Plum Creek, including dead fish. It was estimated that 15,235 fish were killed. The water quality violations threaten the integrity of the water quality program. Based on the above considerations, \$1,250.00 is assessed for this factor.

Culpability – Mr. Sellner has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. Mr. Sellner has contacted the county NRSC office for assistance to prevent future runoff from his facility and is taking steps to control manure runoff. Based on the above considerations, \$500.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Larry Sellner. For that reason, Larry Sellner waives his right to appeal this administrative consent order or any part thereof.

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VIII. NONCOMPLIANCE

Failure to comply with this order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order. DNR reserves the right to bring enforcement action, including penalties, or to request that the attorney general initiate legal action to address other violations not described in Section "IV. Conclusions of Law" of this administrative consent order but which may arise from the facts summarized in Section "III. Statement of Facts" of this administrative consent order. DNR specifically reserves the right to pursue enforcement action, including penalties, for any current violations not specifically cited in this order.



RICHARD A. LEOPOLD
Iowa Department of Natural Resources

Dated this 19 day of
Oct., 2007.



For LARRY SELLNER

Dated this 12 day of
Oct., 2007.

#No Number; Kelli Book; Sue Miller; Kenneth Hessenius; Gene Tinker; EPA; VIII.D.1.b,
VIII.D.3.a

RECEIVED
OCT 15 2007

ATTACHMENT A

